FILED
FEB 13 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944

No. 945

JAMES NEGRO,

Petitioner,

v.

BOSTON AND MAINE RAILROAD,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

IRVING I. GOLDSMITH,
Of Counsel.

Saratoga Printing Company, Saratoga Springs, N. Y.

INDEX

	Page
Petition for Writ of Certiorari	1
Statement of Case	2
Opinions below	3
Jurisdiction	3
Statute involved	3
Summary statement of facts	4
Question presented	6
Reason relied on for allowance of writ	6
Brief supporting petition	7

TABLE OF STATUTES

Judicial Code, 28 U. S. C. A., Sec. 344	3
Federal Employers' Liability Act, 45 U. S. C. A., 51-54	3

TABLE OF CASES

Bailey v. Central Vermont Ry., 319 U. S. 350	9
Bimberg v. Northern Pac. R. R. 14 N. W. 2nd, 410	9
Brady v. Southern R. R., 320 U. S. 476	10
McGivern v. Northern Pac. R. R., 132 F. 2nd, 213	9
Owens v. Union Pac. R. Co., 319 U. S. 715	9
Ross v. Louisville & N. R. Co., 172 So. 752	9
Tennant v. Peoria, etc. Ry. Co., 321 U. S. 29	10
Tiller v. Atlantic Coastline R. Co., 318 U. S. 54	11

IN THE

Supreme Court of the United States

October Term, 1944

No......

JAMES NEGRO,

Petitioner,

v.

BOSTON AND MAINE RAILROAD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James Negro, respectfully prays that a writ of certiorari be issued from the Supreme Court of the United States directed to the Supreme Court of the State of New York, commanding that Court to certify for review and determination a transcript of the record and all proceedings in the case entitled James Negro, plaintiff-appellant, against Boston and Maine Railroad, defendant-respondent, and that the order of the Court of Appeals affirming the order of the Appellate Division, Third Department, and the judgment entered thereon may be reversed, and that the judgment of the

Trial Court be reinstated, and that the petitioner may have such other and further relief as may be just and proper.

Statement of the Case.

This action was brought by plaintiff in the Supreme Court of the State of New York under the Federal Employers' Liability Act (Title 45, U.S.C.A., Secs. 51 et seq.) to recover damages for personal injuries sustained by plaintiff, while in the employ of defendant, by reason of the negligence of defendant.

The action was commenced September 16, 1943 (R-1).

The complaint alleges in substance that on the 1st day of July, 1943, while plaintiff was engaged in the performance of his duties as freight handler or trucker at the Mechanicville, N. Y., freight transfer dock of the defendant, he was caused to slip and fall on the dock platform in such a manner that a heavy truck which plaintiff was pushing fell on plaintiff, whereby plaintiff sustained multiple comminuted fractures of the right tibia, and that such fall and injuries were caused solely by reason of the negligence of the defendant (R-4-6).

The answer is a general denial of negligence on part of the defendant and alleges contributory negligence on part of plaintiff (R-7).

The case was tried in Supreme Court, Saratoga County, New York, before Mr. Justice Lawrence and a jury, at the January 1944, term, and resulted in a verdict in favor of plaintiff for the sum of Five Thousand Dollars, and judgment for that amount, with Seventy-two Dollars and fifty cents costs was entered in the Saratoga County Clerk's Office on January 31, 1944 (R-19).

Defendant appealed to the Appellate Division of the Supreme Court, Third Department (R-2), which court, two Justices dissenting, reversed the judgment of the trial court and dismissed the complaint (R-161-163).

Plaintiff thereafter appealed to the Court of Appeals of the State of New York, which court affirmed the decision of

the Appellate Division by a divided Court, without opinion, Justices Loughran and Conway dissenting.

Opinions Below.

The majority opinion of the Appellate Division, Third Department (R-165-169), and the dissenting opinion of the same Court (R-170), are reported 286 App. Div. 59. There was no opinion in the Court of Appeals. The case is officially reported in 293 N. Y., 791 (Weekly Advance Sheets No. 301, February 3, 1945).

Jurisdiction.

The decision of the Court of Appeals of the State of New York was made on the 16th day of November, 1944, and judgment entered thereon on the 18th day of November, 1944. That said judgment is a final judgment rendered in this action by the highest court of the State of New York, in which a decision in this suit could be had. The jurisdiction of the Supreme Court is invoked under Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 344).

Statute Involved.

The federal statute directly involved is the Federal Employers' Liability Act (U.S.C.A. Title 45, Secs. 51, et seq.)

Section 51 provides in part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Summary Statement of Facts.

Defendant maintains at or near the City of Mechanicville, New York, a freight transfer terminal where freight in transit between various points in the United States and elsewhere is transferred from one train to another. It consists briefly of two platforms each about 800 feet long (R-73) running parallel to each other and separated by a single railroad track (R-74) and having numerous railroad tracks on each side of and running parallel to the platforms (R-74). Freight cars are lined up on these tracks and small bridges are placed between the platforms and the cars and between the cars (R-42, 43). Freight is moved from the various cars to the platforms and thence to other cars. This is done by means of two-wheeled hand trucks. (See exhibits, R-152 and 154). About sixty to eighty men are usually employed in this operation (R-80).

The men move their trucks in various directions up and down and across the platforms (R-82).

Near the outer edge of each platform and running the full length thereof is a set of steel plates known as "runways." These plates are ten inches wide and are placed about eleven inchs apart and are about fifteen inches from the outer edge of th platforms (R-74-75). The platforms are fifteen feet, five inches wide (R-74) and are divided lengthwise by a line of posts which support the roof. (Exhibits 1 and 2, R-148, 150).

The runways are provided to facilitate the movement of trucks up and down the platforms. They were smooth and slippery, had been in constant use for over fifteen years, and no abrasive substance had ever been applied to them (R-88). These facts were not disputed.

On the day of the accident, plaintiff was engaged in his duty of conveying freight from one car to another. He was pushing his truck along the runways on one of the platforms. On his left and about fifteen inches away was a line of freight cars. On his right and about three or four feet away was the line of posts which support the roof. There were about eigh-

teen cars lined up along the platform and the doors of all of them were open.

As plaintiff pushed his truck along, suddenly and without warning, an other employee pushed a truck containing a large crate out of a car door directly into plaintiff's path. Plaintiff in attempting to avoid a collision, slipped on the steel runways and fell. The truck fell on his leg causing the injury complained of (R-46). Plaintiff's version of the accident, while disputed on the trial, was conceded as true in both appellate courts below.

Plaintiff contends defendant was negligent in failing to provide a safe place to work in that the platform was too narrow to provide ample room for the movement of a large number of men and trucks, that the steel plates upon which plaintiff was required to step were slippery and dangerous, that no rules were provided for the safe movement of men and trucks, and that no guards, warnings or other means were provided to protect plaintiff against trucks coming suddenly out of car doors.

Plaintiff also contends that the act of the employee in pushing a loaded truck out of a car door directly into plaintiff's path without taking any means or precaution to see if the way were clear and in violation of a rule that loaded trucks should be pulled out of cars and not pushed, whereby plaintiff was injured, was a negligent act for which the defendant was responsible.

The jury decided on the evidence presented that the defendant was negligent. Plaintiff contends that there is ample proof to sustain the verdict of the jury.

The Appellate Division, by a divided vote, reversed the judgment of the trial court on the ground that the defendant assumed the risks of his employment (R-165-169).

Plaintiff contends this ruling is erroneous and contrary to the statute (U.S.C.A., Sec. 54), and contrary to the decisions of the Supreme Court.

On plaintiff's appeal to the Court of Appeals of the State of

New York, the judgment of the Appellate Division was affirmed, by a divided court, without opinion, on the ground that there was no proof of any negligence causing the injury.

Question Presented.

Was there sufficient evidence of negligence to sustain the verdict of the jury?

Reasons Relied on for Allowance of Writ.

1. There was ample proof of the defendant's negligence causing the injury.
2. Plaintiff has in effect been deprived of a right to trial by jury which is part and parcel of the remedy provided by the Federal Employers' Liability Act.
3. That the decision of the State Courts is in conflict with the Federal Statute and the decisions of the Federal Courts.
4. That the decision of the State Courts has abolished the authority of the Federal Employers' Liability Act in the State of New York.
5. That the decision of the Court of Appeals, in affirming without opinion, the decision of the Appellate Division creates confusion as to the existence of the so-called "doctrine of assumption of risk."

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be granted in this case to the Supreme Court of the State of New York and cause the records in this case to be brought to this Court for final review and determination.

Dated February 7, 1945.

JAMES NEGRO, *Petitioner*,
by IRVING I. GOLDSMITH,
Counsel for Petitioner,
398 Broadway,
Saratoga Springs, N. Y.